NO. 47826-9

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TYREE WILLIAM JEFFERSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson

No. 13-1-02796-0

BRIEF OF RESPONDENT

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6. Whether defense counsel was constitutionally ineffective where there has been no showing that counsel's trial behavior, objections and arguments lacked any conceivable legitimate strategic purpose?

7. Whether the trial court abused its discretion by not declaring a mistrial but instead removed a complained about juror and confirmed through brief *voir dire* that none of the other jurors' impartiality had been compromised?

8. Whether the defendant has sustained his burden concerning cumulative error when he failed to establish (1) the fact of multiple errors, or (2) prejudice, where the errors were not actually errors and where there was no prejudice to the right to a fair trial?

B. STATEMENT OF THE CASE.

1. Procedural History.

On July 12, 2013, Appellant Tyree William Jefferson (the "defendant") was charged with one count of first degree assault by alternative means and one count of unlawful first degree possession of a

firearm. CP 1-2. The charges were subsequently amended on November 4, 2014, to add one count of attempted first degree murder. CP 40-42.

The case was assigned to trial department 21 and called for trial on April 30, 2015. RP 3. The trial court heard and ruled on a number of pre-trial motions. The motions included an unopposed motion to exclude gang evidence. CP 45-56. RP 39. In its ruling, at the request of the prosecution, the trial court ruled that witnesses who knew the defendant or other parties by moniker or street name could refer to them by those names. RP 41-44. The court however also expressed its preference for given names. *Id.* Consistent with the ruling, during trial testimony the defendant's accomplice, Dimitri Powell, was occasionally referenced by the name "Shake" or "Shake Man", and largely or entirely without objection. RP 411, 421-22, 721-22, 736, 838.

Jury Selection commenced on May 4, 2015. During the second day of jury selection the court advised the parties that the proceedings would recess early at 3:00 in the afternoon so that the court could attend a juror appreciation week proclamation by the county council. RP 224. No objection was interposed. The next day the court noted to the jury and the parties that one of the jurors had attended the proclamation and that the juror's presence was appreciated by the council. RP 314. Again no objection was made and no motions were brought.

During jury selection the trial court ruled on a defense peremptory challenge objection based on ***Batson v. Kentucky***[1]. RP 238. The objection was made by the Caucasian female defense attorney in a trial presided over by an African American judge and prosecuted by an African American prosecutor. RP 244. The trial court questioned whether the juror was in fact the only African American juror saying, "there are so many people who are mixed race, and whatever, identify different ways." RP 240. Nevertheless for the sake of argument the court cautiously assumed that the defense attorney was correct in her belief that the juror was the only juror of African descent, considered the authority cited by the defense and ruled that a *prima facie* case had been made. RP 241. Thereupon the court required the prosecutor to justify the challenge, which the prosecutor did without complaint. *Id.*

The prosecutor cited a number of reasons for his peremptory challenge that had nothing to do with race. He stated that he had employed the same analytical method for the challenged juror that he employed with all of his challenges. RP 241. He cited the juror's attitude toward *voir dire* as "a waste of time". RP 242. He also cited a distinct change of attitude when the juror was questioned by the defense, namely that the juror then enthusiastically responded to questions about a motion picture having as its primary theme acquittal of a criminal defendant. RP

[1] ***Batson v. Kentucky***, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)

243-44. The prosecutor also cited the juror's admitted past juror misconduct consisting of the juror introducing extrinsic information into deliberations in a case in the past. The juror was not contrite about it and instead said, "I was too open-minded I guess." RP 244-45. Upon hearing the prosecution's justification, the trial court ruled that the challenge was not racially motivated. RP 245-46.

Trial testimony commenced on May 5, 2015. RP 281. The state called eleven witnesses and the defense two. CP 194. One hundred and thirty-seven exhibits were marked for identification. CP 186-193. The exhibits included surveillance video footage from the bar where the incident began and from the gas station across the street where the shooting occurred. CP 189, Exhibits 66, 67, and 69. The footage included multiple camera angles. *Id.* The exhibits also included still images captured from the video. CP 191, Exhibits 92 – 113. During testimony from the prosecution's witnesses the still images were admitted and the individuals depicted, including Dimitri Powell and the defendant, were identified by clothing, features and name. *See* RP 457-458, 563-69, 723, 858, 867-73. The state also introduced evidence from the police identification procedures. These included identifications by the witnesses from photo arrays, some of which were videotaped during police interviews. CP 189, Exhibits 63-64. *See* RP 442, 495-99, 610-11, 637-38, 850-59, 869-73, 908-13, 935-40.

During the defense case the defendant sought to introduce duplicate still images through the defense investigator, Patrick Pitt. RP 1047. Mr. Pitt was not offered as an expert witness who could give opinions about the technical aspects of the video evidence. RP 1052. Instead, according to the offer of proof, he was proffered to testify about having made video stills from the same surveillance video footage that had already been admitted into evidence and published to the jury. RP 1047-58. Although he was not present at the scene, did not know the witnesses by sight, and could not testify from personal knowledge as to who was depicted and what they were doing, he proposed to authenticate and identify the duplicate still images. RP 1051-56. The court viewed the proffered exhibits. RP 1050. It ruled that the proffered testimony and exhibits had little probative value and carried a good deal of prejudice in that it was cumulative and confusing. RP 1051-56.

The trial proceedings were marred by several unusual events. In one the trial court was called upon to deal with a hostile prosecution witness, Harmony Wortham. Ms. Wortham had been flown in from California by the prosecution to testify. RP 651-59. She appeared on a Thursday. RP 412. Despite having been ordered to return to court, she attempted to flee back to California before completing her testimony. *See* RP 512, *et. seq*. The incident took place on Monday, May 11, 2015, following a three day weekend recess. *Id.*

The prosecution was forced to move for a material witness warrant after Ms. Wortham had changed her flight and gone to the airport Monday morning to return to California. *Id.* The trial court spent a considerable amount of court time to discern what had happened but ultimately secured Ms. Wortham's presence and the completion of her testimony via a warrant. RP 517. At the conclusion of Ms. Wortham's testimony, the trial court allowed brief inquiry into the facts. RP 651, *et. seq.*

During a short *voir dire* by another prosecutor, Ms. Wortham confirmed (1) that she had talked to the defense attorney during the weekend, (2) that the defense attorney had provided her legal references concerning the need for her to appear, and (3) that the defense attorney told her, "That I should look up subpoena information." RP 657-58. She thereupon changed her plane ticket and attempted to fly back to California without completing her testimony, to include cross examination by the defense. RP 652-53. Outside the presence of the jury, the trial court declined to rule on whether the defense had committed witness tampering, whether the defense should pay for the changed return plane ticket, and ultimately indicated that the matter should be dealt with by the bar association's disciplinary procedures. RP 586, 653, 1133-36. The record does not reflect whether the court or the prosecution ever referred the matter to the bar.

A second problematic circumstance surfaced several times. This could be referred to as gallery misconduct. *See* RP 498, 647, 660-61, 736-

37. In these instances people in the gallery were cautioned about behaviors that could impact the fairness of the trial. *Id.* In one particular incident the court caused the defendant's father to be removed when, after having been given a warning and a second chance, the father declined to conduct himself appropriately. RP 592-93, 661, 667-72, 1006-09. The trial court also praised good behavior in the gallery, saying at one point:

> I don't know if it's Mr. Jefferson's mother, or what, or relative who has been here, I think at all the hearings, and I think she knows how important it is that everybody be civil, that we try to do everything we can to make sure that this is a fair trial and that nobody does anything to interfere with Mr. Jefferson's right to a fair trial. And to the extent that she's – some of the folks in the gallery – been the one with the level head, I appreciate that. And so this is really important to me, and I just wanted to be clear about it.
> RP 737.

The court's evenhandedness in dealing with these incidents is further illustrated by the court's admonishment of the prosecutor for using the defense attorney's first name and calling for civility. RP 644, 736-37.

2. Statement of Facts.

The evidence presented during the trial showed that the shooting started with a minor incident involving sunglasses. Harmony Wortham and Lashonda Goodman testified about having gone to a South Tacoma nightclub, Latitude 84, on Valentines Day 2013. RP 414, 838. While there, they had contact with the defendant and Dimitri Powell. RP 418-19, 838-840. During the evening the victim, Rosendo Robinson, took

$300.00 designer sunglasses from Ms. Goodman and failed or refused to return them. RP 395, 419-20, 884-85. Ms. Goodman believed that he had tossed them over a fence. *Id.* The incident led to an altercation, and to Ms. Goodman and Ms. Wortham being excluded from the club, and to a subsequent fight with Mr. Robinson across the street at a gas station. RP 432-33, 887-892.

The fight began as a physical fight between Lashonda Goodman and Rosendo Robinson. RP 893. Ms. Goodman went to Mr. Robinson's car and started punching him through the car window while he was still in the car. *Id.* Dimitri Powell and the defendant arrived in a separate vehicle. RP 547-48. This was a vehicle that they had earlier borrowed from a friend, Jessica Hunter. RP 935-36. The fight continued between the unarmed combatants until gunfire erupted. RP 436, 894-95.

Mr. Robinson was struck by bullets first at the fight scene at the gas station and then as he fled on foot across the street. RP 548-50. He sustained five, life threatening gunshot wounds to the torso. RP 553, 978-79. He did not know the man who shot him, but he was face to face with Mr. Powell just before having been shot and testified that Mr. Powell did not have a gun. *Id.* He later identified Mr. Powell from a photo montage. RP 703-04. He explained however that after having seen the video, it changed his perception just "of who, obviously, I got shot by." RP 706. Ms. Wortham, Ms. Goodman and Ms. Hunter identified the defendant

separately from photo montages, and Ms. Wortham identified him as the shooter. RP 442, 610-11, 870, 906-07.

The prosecution utilized the video surveillance footage and still images from it with all of its scene witnesses. RP 457-458, 563-69, 723, 858, 867-73. As would be expected, the quality of the images varies depending on the particular camera angle but the defendant's image can be readily discerned both as to physical features and hairstyle and as to clothing. CP 191, Exhibits 92 – 113.

3. Closing Arguments, Verdict and Sentencing.

Closing arguments were presented on May 19, 2015. The prosecution began with a discussion of the jury instructions, continued with a discussion of the credibility and biases of the scene witnesses, and included a discussion of the video evidence and stills. *See* RP 1156-70. During his closing the prosecutor played the video of the actual shooting at the gas station (without objection) which showed Dimitri Powell in one area and the defendant perpetrating the shooting in another. RP 1170-71. The prosecutor concluded by again referencing the jury instructions, particularly the premeditation definition and the elements of the crimes. RP 1178-84.

The defense attorney argued that Dimitri Powell, not the defendant, had done the shooting. RP 1276. Like the prosecutor, the defense attorney spent considerable time on credibility of the witnesses and why they would have allegedly misidentified him as the shooter. *See*

RP 1276-84. She also attacked the quality of the police investigation [RP 1290-99.], the montage pick by Mr. Robinson [RP 1301-02], and concluded with a discussion of the jury instructions, including premeditation [1302-10].

Both side's closing arguments drew multiple objections. The prosecution's rebuttal argument in particular was interrupted as many as eleven times with ten of the objections overruled and one sustained. The sustained objection concerned a characterization of the defense argument. RP 1312. The prosecutor responded to the objection by immediately rephrasing it in terms of the trial testimony. RP 1312-13. This prompted the defense attorney to voice a speaking objection (overruled) as follows:

> MS. COREY: Your Honor, I'm going to object.
> Argument is argument. It is not agreement. It is argument.
> It is to assist the jury with the facts. It is not
> evidence. Counsel knows that.
> RP 1313.

During the closing arguments, an incident of possible jury tampering occurred. RP 1325. Unbeknownst to the court the jurors left the courthouse the previous day (the day before closing arguments) at the same time as the defendant's family and supporters. RP 1185. One of the jurors became concerned and at the urging of the other jurors brought her concerns to the attention of the court the next day. *Id.* With the agreement of the parties, the court first questioned that juror and then the entire jury to determine if they could fairly and impartially deliberate. All

of the jurors except the one who voiced concern initially indicated that their impartiality was unaffected. *See* RP 1185-41. The defense moved for a mistrial. *Id.* After a short recess to consider the issue, the trial court denied the mistrial motion, excused the one juror who had voiced concern, and continued with the closing arguments. RP 1266-69.

The jury commenced deliberations the next day. On May 20, 2015, the jury returned guilty verdicts, convicting the defendant as charged of both attempted first degree murder and first degree assault, and of unlawful first degree firearm possession. CP 180-83.

The defendant was sentenced on July 17, 2015. CP 403-416. He received a low-end standard range sentence of 277.5 months in prison, plus sixty months additional for the firearm sentenced enhancement. *Id.* This timely appeal was filed on July 24, 2015. CP 422-436.

C. ARGUMENT.

1. THE DEFENDANT HAS NOT CARRIED HIS BURDEN OF ESTABLISHING PURPOSEFUL RACIAL DISCRIMINATION WHERE THE PROSECUTOR OFFERED A NUMBER OF NON-RACIAL REASONS FOR HIS PREEMPTORY CHALLENGE AND WHERE THE CHALLENGED JUROR HAD ADMITTED TO POTENTIAL JUROR MISCONDUCT IN A PRIOR CASE.

The equal protection clause of the Fourteenth Amendment prevents a party from challenging a potential juror solely based on race. ***Batson v. Kentucky***, 476 U.S. 79, 85–86, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986).

Batson established a three-part test to determine "whether a venire member was peremptorily challenged pursuant to discriminatory criteria." ***State v. Rhone,*** 168 Wn.2d 645, 651, 229 P.3d 752 (2010). First, the party alleging such discrimination must establish a prima facie case of purposeful discrimination. *Id.* at 651. Second, the burden shifts to the other party who must provide a race-neutral explanation for challenging the potential juror. *Id.* Finally, the trial court determines whether the challenging party has established purposeful discrimination. *Id.* The defendant carries the burden of proving the existence of purposeful discrimination. ***Batson,*** 476 U.S. at 93.

The court in ***Batson*** explained "that our cases concerning selection of the venire reflect the general equal protection principle that the 'invidious quality' of governmental action claimed to be racially discriminatory 'must ultimately be traced to a racially discriminatory purpose.' " ***Batson,*** 476 U.S. at 93, quoting ***Washington v. Davis,*** 426 U.S. 229, 240, 96 S. Ct. 2040, 2048, 48 L. Ed. 2d 597 (1976). To that end, a reviewing court relies upon the trial court's judgment and that determination "is accorded great deference on appeal, and will be upheld unless clearly erroneous." ***State v. Rhone,*** 168 Wn.2d at 651, quoting ***State v. Hicks,*** 163 Wn.2d 477, 486, 181 P.3d 831 (2008). The Supreme Court has furthermore stated that we have "made it clear that in

considering a ***Batson*** objection, or in reviewing a ruling claimed to be ***Batson*** error, all of the circumstances that bear upon the issue of racial animosity must be consulted." ***Foster v. Chatman***, ___ U.S. ___, 136 S. CT. 1737, ___L. Ed. 2d___, 2016 WL 2945233 (May 23, 2016), *quoting* ***Snyder v. Louisiana***, 552 U.S. 472, 478, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008).

The foregoing principles should lead this Court to uphold the trial court's judgment on this issue. Setting aside for the moment the justifications articulated by the prosecutor, the circumstances evident to the trial court included the following: (1) the case was being tried before an African American judge, (2) the prosecutor was African American [RP 244, 246.], (3) the defendant was African American, and (4) the defense attorney was a Caucasian woman. RP 244. No claim was made that the African American prosecutor had a customary practice of discriminating against African American venire members. Thus, in essence the defense attorney's objection amounted to this: the African American prosecutor chose this particular case to attempt to engage in purposeful race discrimination against an African American venire member. Even more implausibly he did so allegedly against a venire member who shared both his and the judge's racial background. Whatever may be said of the prosecutor's explanation for his peremptory challenge, it seems at least possible at the outset that the challenge itself was motivated by something

other than a concern about equal protection. Nevertheless the trial court accorded the defense attorney's arguments the same respect that he showed the prosecutor, as one would expect of an experienced and unbiased judicial officer.

As any trial lawyer or trial judge knows, "there are a host of other factors, any one of which may determine a trial attorney's choice to remove a venire member, including the tone and inflections in a venire member's voice, as well as non-verbal cues, including eye contact, body gestures, reactions to other venire members' responses, et cetera." ***State v. Meredith***, 163 Wn. App. 75, 259 P.3d 324, 328-29 (2011), *aff'd*, 178 Wn. 2d 180 (2013). The prosecutor's justification in this case reflected just such factors. He articulated the following: (1) he applied the same analysis to the particular venire member that he applied to all seven of his peremptory challenges [CP 443. RP 241.], (2) in response to the prosecution's questions, the venire member in question stated that they were a "waste of time" [RP 242.] whereas when the defense attorney inquired about a motion picture having a plot that included acquittal of a criminal defendant, he "seemed to be very enthusiastic about the movie" [RP 244.], (3) another venire member who was also enthusiastic about the movie (No. 9) was also challenged and for the very same reason [RP 243]; (4) finally the venire member had also previously sat on a jury and had engaged in possible juror misconduct that consisting of introducing extraneous evidence into deliberations [RP 244-45.]. The prosecutor for

obvious reasons had legitimate concern about the venire member in light of his nonchalant or defiant explanation of his past misconduct, namely "I was too open-minded, I guess". RP 245.

After hearing the prosecutor's reasons for the peremptory challenge the trial court articulated his reasons for sustaining the challenge to the venire member at issue. The court stated:

> There are legitimate non-discriminatory reasons, that are not based, why Mr. Curtis wants to strike No. 10, notwithstanding the fact that they are both African-American men; the fact that he didn't bond with him; he didn't feel comfortable with him in terms of his earlier responses; the issue about 12 Angry Men and is familiarity with the movie and that he feels like that person's favorable . . . And I don't in essence, I don't believe that the state has – that the defense has shown that that, in some – in any way is pretext or cover for race-based strike, so I'm going to deny the motion. RP 246-47.

When this Court accords the trial court's determination the deference that it deserves on this issue, it cannot be said that the trial court's judgment was "clearly erroneous". ***State v. Rhone***, 168 Wn.2d at 651. The trial court gave the defense the benefit of the doubt by ruling that the defense had met its initial *prima facie* burden of production. It ruled however that the defense had not carried its burden of proof. That determination under all of the circumstances in this case should be upheld.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS RULINGS ON ADMISSIBILITY OF EVIDENCE WHERE IN ONE INSTANCE THE EVIDENCE WAS EXCLUDED AT THE DEFENSE REQUEST AND IN THE OTHER IT CONSISTED OF EVIDENCE THAT DUPLICATED EVIDENCE ALREADY ADMITTED AND WAS THUS CUMULATIVE.

The admission of evidence lies within the trial court's sound discretion. ***State v. Darden***, 145 Wn. 2d 612, 619, 41 P.3d 1189 (2002) ("A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion.") citing ***State v. Powell,*** 126 Wn.2d 244, 258, 893 P.2d 615 (1995), and ***State v. Luvene,*** 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995) "Abuse exists when the trial court's exercise of discretion is "manifestly unreasonable or based upon untenable grounds or reasons." *Id.* ***State v. Rehak,*** 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *rev. den.* 120 Wn.2d 1022 (1993)("An abuse of discretion exists only where no reasonable person would take the position adopted by the trial court."), citing ***State v. Huelett,*** 92 Wn.2d 967, 969, 603 P.2d 1258 (1979).

Two of the trial court's evidence rulings are presented for review under this standard. The first is what was denoted as gang evidence but that in fact consists of monikers or street names used by some of the witnesses. The other ruling concerned certain proffered defense trial

exhibits that were similar or identical to still images introduced by the prosecution. Both of these issues suffer from not having been preserved and have not been shown to have been an abuse of discretion.

a. The trial court did not abuse its discretion by excluding gang evidence but permitting witnesses who knew individuals by a moniker or street name to use those names to identify who they were talking about.

As with other ER 404(b) evidence, so-called gang evidence may not be admitted to prove that the defendant was prone to commit the crimes with which he was charged but may be admitted for other purposes. ***State v. Yarbrough***, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009). Notably gang evidence may be admitted as proof of motive, identity, or intent. *Id.* For obvious reasons gang evidence carries with it the potential of "unfair prejudice" and thus a connection between the crime and the defendant's gang affiliation is necessary in order to admit evidence of gang membership. ER 403. *See* ***Dawson v. Delaware***, 503 U.S. 159, 166–67, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992), ***State v. Embry***, 171 Wn. App. 714, 732, 287 P.3d 648 (2012), *review denied,* 177 Wn.2d 1005 (2013) and ***State v. Campbell***, 78 Wn. App. 813, 822, 901 P.2d 1050, *review denied,* 128 Wn.2d 1004 (1995). Unfair prejudice means that the evidence would likely arouse an emotional response rather

than a rational decision. ***State v. Rice***, 48 Wn. App. 7, 13, 737 P.2d 726 (1987).

Before gang evidence may be admitted, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the intended purpose for the evidence, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) determine whether the probative value outweighs the prejudicial effect. ***State v. Yarbrough***, 151 Wn. App. at 82. A trial court's gang evidence or ER 404(b) ruling is reviewed for abuse of discretion. *Id.* at 81. ***State v. Foxhoven***, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). An appellate court should reverse a discretionary ruling only if it has "a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached." ***United States v. Schlette***, 842 F.2d 1574, 1577(9th Cir. 1988).

In this case, the trial court ruled without objection that gang evidence would not be admitted. RP 39-41. This was in response to defense motion *in limine* number 6. CP 45-56. In its ruling however the trial court reasonably accommodated the testimony of certain witnesses who knew the participants in the shooting by monikers or street names. The defense did not voice an objection to this accommodation and thus did not preserve error to the extent that it now claims the court's ruling

constituted a ruling admitting gang evidence. ***State v. Weber***, 159 Wn. 2d 252, 275, 149 P.3d 646(2006) (Failure to object to alleged pre-trial motion gang evidence violation amounted to "failure to preserve the error on appeal.")

The lack of defense exception to the trial court's ruling carried through to the trial testimony. As was forecasted by the prosecution during the motion hearing, several witnesses knew the defendant and Dimitri Powell by their street names. These witnesses included Harmony Wortham [RP 421, 482], Sesilia Thomas [RP 721-22], and Lashonda Goodman [RP 838, 840-41, 908]. When these witnesses used monikers they did so because those were the names by which they knew the two defendants. It would be inaccurate to characterize their testimony as gang testimony. The testimony was introduced wholly consistent with the trial court's pre-trial ruling and largely without objection. The lack of objection from the defense provides further support for the view that the evidence was not unfairly prejudicial because it did not suggest the defendants were gang members.

The defendant's position in this appeal is that the sparse use of the monikers by some witnesses constituted an implicit association of the defendants with a street gang. Since there was no testimony about what a street gang is, nor how one might become a member, nor what rights,

privileges and obligations membership entails, nor how the shooting was motivated by gang membership, nor to what extent the defendants were members, this argument is not persuasive. The prosecution agreed with the defense that this was not a gang case and conducted the trial accordingly. As to the assignment of error concerning alleged gang evidence, the defendant's arguments are not well taken.

b. *The trial court did not abuse its discretion by restricting video image evidence that duplicated or was cumulative of evidence previously admitted.*

A second evidentiary ruling concerned certain proffered images captured and printed from the surveillance footage. RP 1043-54. Under the Sixth Amendment and under Article 1, Section 22 of our state constitution, a criminal defendant has the right to present testimony in his defense. ***State v. Hudlow***, 99 Wn.2d 1, 14–15, 659 P.2d 514 (1983) (sexual history of rape victims). The right to present defense evidence has been held to protect the right of the defendant "to offer the testimony of witnesses, and to compel their attendance, if necessary, [and] is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." ***Washington v. Texas***, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). It includes a due process right to present

the defendant's version of the facts. ***State v. Thomas***, 150 Wn.2d 821, 857, 83 P.3d 970 (2004). But this right is not unlimited. A defendant does not have the right to present irrelevant evidence. ***Hudlow***, 99 Wn.2d at 15. Moreover, just as it may do so in the prosecution's case, a trial court may exclude proffered evidence that is "counterbalanced by the state's interest in seeing that the evidence is not so prejudicial as to disrupt the fairness of the fact-finding process." *Id.*

Where a defendant alleges a violation of the right to present a defense, it is incumbent on the defendant to "make some plausible showing" of how the witness' testimony "would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses." ***United States v. Valenzuela-Bernal***, 458 U.S. 858, 867, 873, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982). The mere presence of a witness with personal knowledge at the scene of a criminal offense is, by itself an insufficient showing of materiality. ***State v. Smith***, 101 Wn.2d 36, 677 P.2d 100 (1984).

Washington courts have consistently required a showing of materiality in cases alleging violation of the right to present a defense. In ***State v. Thomas***, 150 Wn.2d 821, 857, 83 P.3d 970 (2004), an aggravated murder case, the testimony at issue concerned another possible suspect. The court stated, "In keeping with the right to establish a defense and its

attendant limits, 'a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense.'" *Id.* at 857, quoting ***State v. Hudlow***, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Similarly, in an assault and robbery case, inadmissible propensity and mental health evidence was held to have been properly excluded because a "defendant's right is subject to reasonable restrictions and must yield to 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" ***State v. Donald***, 178 Wn. App. 250, 263-64, 316 P.3d 1081 (2013), citing ***United States v. Scheffer***, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998) and quoting ***State v. Finch***, 137 Wn.2d 792, 825, 975 P.2d 967 (1999). In short, a defendant's right to present evidence does not exempt him from the basic rules of evidence. ***State v. Darden,*** 145 Wn.2d 612, 624, 41 P.3d 1189 (2002). ("[W]e apply basic rules of evidence to determine whether the trial court violated [the defendant's] confrontation rights."). *See also* ***Chambers v. Mississippi,*** 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

In this case, the witness at issue was a defense investigator, Patrick Pitt. He had reviewed the surveillance footage and at some point in time had captured still images. RP 1052. Mr. Pitt did not testify as an expert,

and due to lack of personal knowledge also did not testify as a fact witness. RP 1053.

The trial court voiced a number of concerns about the proffered evidence. Before conducting an offer of proof the court alerted the defense attorney to a number of issues related to admissibility as follows:

> We're at the third week of trial. The videos have not been a surprise to anybody. We all knew that they were there. We all knew what cameras were there, and I believe in almost every other occasion, either a person who actually observed, or operated the camera, or owned the camera, or took the picture, or could provide some basis for what we're seeing, is the one that we introduced the evidence through. And you know that better than I do. And, in fact, that's why we don't just say, okay, Jury, here's some pictures. Go for it. Figure it out. That's always one of the issues.
>
> So the question is, well, (1) I'd like to see the photos that we're talking about to make sure they're not cumulative. And the other issue is how you get them in through Mr. Pitt. He's not a witness.
>
> RP 1048-49.

The offer of proof did not satisfy the trial court's concerns. Mr. Pitt candidly admitted not knowing how many images were at issue [RP 1051.], nor which camera was involved [RP 1052.]. After viewing the images for itself and thus having a basis to compare them to what was already in evidence, the trial court ruled that the evidence was "cumulative", lacking in "foundation", and "confusing to the jury". RP 1053. In particular the trial court found that:

> Mr. Pitt has obviously taken snippets of photos from a video, but he can't tell us whether they're in any sequence; whether we took the first two minutes; or we took this one from Minute No. 4, or 5, or 3, or 1; or I got the ones that I thought would look good from the first couple of minutes and then the last minute. We don't know any of that, and nobody can explain that to the jury. RP 1053-54.

Considering the lack of showing of anything significant from the still images, it cannot be said that the trial court's ruling was incorrect. Furthermore, under the abuse of discretion standard there is a requirement that there be a showing that "no reasonable person would adopt the view espoused by the trial court." ***State v. Demery,*** 144 Wn.2d 753, 758, 30 P.3d 1278, 1281 (2001). No such showing has been made. For these reasons, as to the claim that the defendant's right to present a defense was violated, the defendant's arguments are not correct.

3. THE DEFENDANT HAS NOT CARRIED HIS BURDEN OF ESTABLISHING AN APPEARANCE OF FAIRNESS VIOLATION WHERE ANY DISINTERESTED PERSON WOULD CONCLUDE THAT THE TRIAL COURT ACTED WITHOUT BIAS OR PREJUDICE.

The appearance of fairness arguments in this case include allegations related to the trial court's rulings on substantive and evidentiary issues. For example, the court's ***Batson*** ruling is re-alleged as an example of an appearance of fairness violation. Opening Brief, p. 46. Issues such as those that are addressed elsewhere will not be reargued here.

A claim of appearance of fairness is non-constitutional and may not be raised for the first time on appeal. RAP 2.5(a), ***State v. Morgensen,*** 148 Wn. App. 81, 90–91, 197 P.3d 715 (2008), *rev. den.,* 166 Wn.2d 1007 (2009). Thus, for an issue to have been preserved, the defense must identify an objection or motion in which the trial court denied a defense request for relief for reasons of bias. Where no such record was made, for this reason alone, this assignment of error should be rejected.

Assuming, for the sake of argument, that this issue in all its forms has been preserved, the appearance of fairness doctrine and due process require a judge to disqualify himself if he is biased against a party or if his impartiality "may reasonably be questioned." CJC 2.11(A)(1). ***State v. Witherspoon,*** 171 Wn. App. 271, 290, 286 P.3d 996 (2012), *aff'd*, 180 Wn. 2d 875(2014) ("Viewing the evidence objectively, the trial judge's impartiality may not be reasonably questioned under these circumstances."), ***State v. Dominguez,*** 81 Wn. App. 325, 328, 914 P.2d 141 (1996), citing ***In re Matter of Murchison,*** 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955). The appearance of fairness doctrine protects not only against actual bias and prejudice, but also against perceived bias and prejudice. ***State v. Mandry,*** 8 Wn.App. 61, 70, 504 P.2d 1156 (1972) ("The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.").

In a challenge based on an alleged appearance of fairness violation, the trial judge is presumed to have acted without bias or prejudice. ***State***

v. Chamberlin, 161 Wn.2d 30, 38, 162 P.3d 389 (2007). The party challenging impartiality bears the burden of presenting evidence of actual or potential bias. ***State v. Dugan,*** 96 Wn. App. 346, 354, 979 P.2d 885 (1999), citing ***State v. Post,*** 118 Wn.2d 596, 619 n. 9, 826 P.2d 172, 837 P.2d 599 (1992). Whether a trial judge has exhibited bias is determined by how "it would appear to a reasonably prudent and disinterested person." ***State v. Dugan,*** 96 Wn. App. 346, 354, 979 P.2d 885 (1999), quoting ***Brister v. Tacoma City Council,*** 27 Wn. App. 474, 486–87, 619 P.2d 982 (1980), *review denied,* 95 Wn.2d 1006 (1981).

Without belaboring the point, the ***Batson*** challenge provided early and compelling evidence of the absence of bias. The trial court did not reject the ***Batson*** challenge out of hand. Instead, it moved on to the third part of the three-part analysis and required the prosecution to bring forth its non-discriminatory reasons. RP 244-49. Had the trial court rejected the ***Batson*** challenge at the *prima facie* stage, there might have been better support for the defendant's bias argument. *Id.*

Review of the other allegations of alleged bias provides no better support for the defendant's claim. The primary allegation was based on colloquy and rulings related to a hostile prosecution witness, Harmony Wortham. *See* RP 507-662. Ms. Wortham was flown in for trial from California at the prosecution's expense. She was at the Latitude 84 club prior to the shooting and was a friend of over twenty years of the defendant's compatriot, Dimitri Powell. RP 416, 435. She was hostile

and her recorded interview was utilized as a recorded recollection after she professed not to remember details of the night in question. RP 491. Her testimony unexpectedly required that she remain in Washington over a weekend.

Just before recessing for the weekend, the defense attorney conveyed to the witness that she may not have been legally served with a subpoena nor legally required to appear. RP 507-08, 518. It then developed that over the weekend that the defense attorney met with Ms. Wortham and provided her with additional legal authority related to whether she could have declined to appear. RP 513-17, 530-33. Ms. Wortham subsequently concluded that she should change her return flight and flee early to California rather than return to court as ordered to complete her testimony. RP 508. As a result a material witness warrant was issued and she was arrested at the airport before she could board her flight to California. RP 519.

The Wortham affair consumed a fair amount of the trial court's time and attention. The trial court's resolution of issues related to Ms. Wortham was cautious and reflective of its primary concern, which was fairness of the proceedings for the defendant. In that regard, the court took the matter under advisement stating:

> But at this point, I have to tell you candidly, I don't think it excuses any discussion about 10.55.060 and anything that suggests to her that she maybe didn't have to show today, or there was some technicality for her to get out of it

following this Court's order, is a serious problem, in my view, and I'm going to research it further. RP 534.

After a recess the court further elaborated on its concerns. It stated that it had concerns concerning whether the defense attorney had willfully violated RPC 3.4(b) which says "The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel." RP 586. Nevertheless, the court did not make a final judgment about whether an RPC 3.4 violation had in fact taken place. It said simply, "And will just be candid with Counsel. I am considering letting WSBA take it up because I don't have time to take it up." RP 586. At the conclusion of Ms. Wortham's testimony the court allowed brief questioning of Ms. Wortham concerning her decision not to return to court but it did not make any further rulings concerning the lawfulness of the defense attorney's behavior. RP 653-59. Instead it quashed the material witness warrant and ordered Ms. Wortham's release so that she could return to California.

The trial court's sensitive management of the Wortham affair was both pragmatic and fair to all concerned. The court at all times allowed both parties to state the facts and make arguments. It withheld judgment and consulted such authorities as might pertain to the issue. Ultimately after hearing testimony from Ms. Wortham, it took appropriate action, namely it quashed the material witness warrant and allowed the witness to depart for California. Considering that the defense attorney was the last trial participant to have had contact with the witness before she attempted

to flee to California, and considering the gratuitous statements the defense attorney made in the witnesses presence concerning the validity of her subpoena, the trial courts ultimate resolution was restrained, appropriate and without evidence of bias.

The trial court's concern for a fair trial was acted upon concerning Ms. Wortham. No unnecessary rulings were made concerning the ethics or actions of either party. There is evidence in the record that the atmosphere in the courtroom became heated. Here too the court again acted impartially, this time in relation to controlling courtroom decorum:

> And I just want to remind everybody that civility and professionalism is of paramount importance in this trial, and anything short of that, I just have to be candid, is unacceptable. And, candidly, I'm concerned that whatever is going on, if anything, between counsel, is spilling out onto people in the gallery, and I don't want that to happen.
> RP 736-37.

As a further show of impartiality the court praised the defendant's mother as a model of appropriate behavior. The court said, "I think she knows how important it is that everybody be civil, that we try to do everything we can to make sure that this is a fair trial and that nobody does anything to interfere with Mr. Jefferson's right to a fair trial. And to the extent that she's -- some of the folks in the gallery -- been the one with the level head, I appreciate that. And so this is really important to me, and I just wanted to be clear about it." RP 737.

The court's demeanor and restrained, understated approach was all that one would hope of a trial judge presiding over an emotionally charged trial. While the court may have had differences with the defense concerning evidentiary rulings, it provided the opportunity for argument and then respectfully articulated the reasons for its rulings. Another example concerned the proposed testimony of the defense investigator, after allowing an offer of proof, the court found that the testimony was not admissible for a number of reasons to include "cumulative" "confusing" lack of "foundation" and personal knowledge. RP 1051-54. Because the images at issue were excerpted from video footage that was already in evidence, the trial court ruling is more than supportable. Even so the court did not make its ruling final. Instead it said, "Well, I'm denying it today, but there's nothing that precluded the defense from showing the freeze frames to Ms. Wortham, Ms. Whoever, Ms. -- any of the witnesses and saying: What is this? And were you here? And you were here. And what is this?" *Id.*

The ruling concerning the defense investigator does not support the bias argument. Instead it shows that the court had a difference with the defense concerning a point of law. If a judge could be accused of bias for merely differing with a lawyer about a point of law, all judges would be biased. Differences about the application of law are part of litigation and do not support an appearance of fairness violation. This assignment of error is not well taken.

4. THE DEFENDANT WAS CONVICTED ON THE BASIS OF OVERWHELMING EVIDENCE AND PROPER JURY INSTRUCTIONS.

The defendant argues that he was convicted of attempted first degree murder on insufficient evidence and faulty instructions. As to sufficiency of the evidence, the standard is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***State v. Hosier***, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Furthermore, "[a]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* at 8.

In an insufficiency claim, the defendant "admits the truth of the State's evidence" and all reasonable inferences that can be drawn from it. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The court defers "to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." ***State v. Thomas***, 150 Wn.2d 821, 874–75, 83 P.3d 970, *abrogated in part on other grounds by* ***Crawford v. Washington***, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177

(2004). Only when no rational trier of fact could have found that the State proved all of the elements of the crime beyond a reasonable doubt can a claim of insufficiency be sustained. ***State v. Smith***, 155 Wn.2d 496, 501, 120 P.3d 559 (2005).

As to the alleged instruction error, the definition of premeditation need not be included in the elements instruction in an attempted first degree murder case. ***State v. Reed***, 150 Wn. App. 761, 772, 208 P.3d 1274 (2009) ("[F]ailure to include the premeditation element in the 'to convict' instruction" was not error and "did not relieve the State of its burden to prove the elements of attempted first degree murder."). ***State v. Brown***, 132 Wn. 2d 529, 606, 940 P.2d 546, 586-87 (1997) ("The instructions adequately follow the law in [separately] defining premeditation and intent."). ***State v. Embry***, 171 Wn. App. 714, 758, 287 P.3d 648, 670 (2012)("As in ***Reed,*** here the trial court's instructions accurately defined the law and the elements of the relevant crimes.").

Premeditation was defined in instruction number 8. CP 151. The instruction was adopted from the pattern instruction, WPIC 26.01.010. It adequately and properly defined premeditation as was required to be proved for the attempted first degree murder charge. The defendant's claim that the definition was required to be included in the elements instruction is incorrect in light of ***Reed, Brown*** and ***Embry.***

As to sufficiency of the evidence, the defendant was convicted upon testimony of several eyewitnesses and video surveillance evidence. *See* Statement of Facts, *infra.* There should be little quarrel with the notion that shooting an unarmed man in the back multiple times as he was running away, where the shots were directed at the victim's torso, is evidence of intent to kill when viewed in the light most favorable to the prosecution. There was little more the defendant could have done to carry out his intent to kill other than to have had better aim or to have administered a *coup de grace.* The evidence of the shooting more than satisfies the requirement that the prosecution prove that the defendant took a substantial step toward committing the completed crime of intentional murder.

The evidence of premeditation is likewise overwhelming. Bearing in mind that the incident began across the street at the night club, that the defendant and Dimitri Powell followed the victims to the gas station, that the fight commenced and that the defendant did not fire the shots until the fight was in progress, there was more than enough evidence and time to prove that the defendant "after any deliberation" formed "an intent to take human life". CP 151, Instruction No. 8. After all the "law requires some time, however long or short, in which a design to kill is deliberately formed." *Id.* The jury had no difficulty finding premeditation. There is

no evidence the jury was irrational. With confidence it can be said that any reviewer who might view the video of the shooting at the gas station in light of the prior events at the night club would have little difficulty with premeditation.

The primary argument offered by the defense at trial, namely identity of the defendant as the shooter, actually undermines the sufficiency claim. RP 1276. The defense argued that someone other than the defendant, that is Dimitri Powell, committed the crimes. This argument tacitly admits that the crime was committed but that it was committed by someone else. This is the risk of an identity defense.

Be that as it may, the evidence likewise more than satisfies sufficiency of the evidence as to identity. The jury not only heard testimony from the scene witness but also saw for themselves who did the shooting. CP Exhibits 66, 67, and 69. Exhibits 92-111. Admittedly, due to obvious bias, Harmony Wortham and Lashonda Goodman refused to identify the defendant in court as the shooter. Nevertheless, they had identified him in their police statements and via montage identifications and were thus readily impeachable. RP 442-475, 492-507, 610-16. 637-39. RP 849-50, 855-58, 867-70, 873, 901-02, 906-09, 913-15. Moreover, the jury had the video and stills and could see for themselves who was at the gas station, where they were positioned and what they were doing at

the time of the shooting. The jury's guilty verdicts for both first degree attempted murder and first degree assault leaves little room for argument that, contrary to the defense closing, Dimitri Powell was not the shooter.

The same standards that apply to attempted murder also apply to the firearm possession charge. It goes without saying that if there was sufficient evidence that the defendant was the shooter, he was also guilty of unlawful firearm possession for having used the gun to do the shooting. There was no question that the shooter used a firearm, after all Rosendo Robinson sustained multiple gunshot wounds. RP 553, 978-79. Likewise there was no issue about the defendant's predicate serious offense conviction, there was a stipulation about that. RP 1041. Thus, there is no room for argument as to sufficiency of the firearm charge in light of the wealth of evidence that the defendant used a firearm to commit the shooting.

The defendant's arguments concerning the jury instructions and sufficiency of the evidence are not well taken. The defendant was convicted on proper jury instructions and on overwhelming evidence. As to the sufficiency and instruction arguments, the defendant's convictions should be affirmed.

5. THE PROSECUTION'S OBJECTIONS AND ARGUMENT WERE NEITHER MISCONDUCT NOR ERROR AND DID NOT CAUSE PREJUDICE.

Prosecutorial error[2] may be premised on improper closing argument or on behavior during trial. ***State v. Lindsay***, 180 Wn. 2d 423, 326 P.3d 125 (2014). In egregious cases such as where the "prosecutor and the lawyer for [a defendant] engaged in unprofessional behavior, trading verbal jabs and snide remarks throughout over 90 volumes" the trial court's failure to maintain decorum may result in reversible error. *Id.* at 426-27. The standard to be applied to evaluate prosecution conduct in such instances is: "(1) whether the prosecutor's comments were improper;

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[2] 'Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." ***State v. Fisher***, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937(2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" for intentional acts, rather than mere trial error. *See* American Bar Association Resolution 100B (Adopted Aug. 9-10,(2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (last visited June 9, 2016); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited June 9, 2016).

A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. *See*, e.g., ***State v. Fauci***, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); ***State v. Leutschaft***, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS196 (Minn., Mar. 17, 2009); ***Commonwealth v. Tedford***, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa.2008). In responding to appellant's arguments, the State will use the phrase "prosecutorial error." The State urges this Court to use the same phrase in its opinions.

and (2) if so, whether the improper comments caused prejudice." *Id.* at 431, citing ***State v. Warren***, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). As will be argued elsewhere a different standard, that is the ineffective assistance of counsel standard, applies to alleged defense attorney misbehavior or error.

The defendant's record citations indicate that error is alleged in the prosecution's phrasing of objections which are characterized as speaking objections. "The term *speaking objection* is not a precisely defined term of art", and is "neither authorized nor prohibited" by the evidence rules, which "leave it to the individual trial judge to decide the propriety of a speaking objection." K.Teglund, 5 Wash. Prac., Evidence Law and Practice § 103.8 (5th ed., 2015)(emphasis in the original). Moreover, the propriety of an attorney's phrasing of an objection must take into account that an "appellate court will not reverse on the basis that the evidence should have been excluded under a different rule which could have been, but was not, argued at trial." ***State v. Christian***, 44 Wn. App. 764, 766, 723 P.2d 508 (1986), quoting ***State v. Ferguson***, 100 Wn.2d 131, 138, 667 P.2d 68 (1983). In light of these principles, no error has been shown in this case.

The trial court was even-handed in its effort to control decorum in the courtroom. An example may be found in the testimony of the first

witness, during the first full day of testimony. The prosecution voiced an objection during the cross examination that went as follows:

> MR. CURTIS: Objection, Your Honor. Counsel is testifying as to --
> MS. COREY: Your Honor, may we be heard outside the presence of the jury? My questions, obviously, are not testimony.
> RP 340.

On its face the objection was less a speaking objection than the response was a speaking response. Nevertheless, at the break the defense attorney went on the attack and moved for a mistrial saying, such objections "are personal attacks on Counsel". RP 347. Even though the defense in this appeal sought to characterize the prosecutor's behavior as having been comparable to ***Lindsay***, the trial court had a reasonable and common sense view of the matter when it said:

> THE COURT: Okay. So I'm going to deny the motion to include that particular instruction. I think Counsel's reading way more into the statement than is warranted, and I think that the instruction that the Court has proposed is appropriate.
> Thanks. We're ready for the jury.
> RP 351.

This exchange during the testimony of Officer Roberts was misconduct of the defense attorney if it was misconduct at all. Another example came later when the defense attorney said, "I think the Court obviously controls its own courtroom" in response to a prosecution request for an admonition of the gallery. RP 647. It is submitted that examples

such as these of courtroom exchanges by either the defense or prosecutor are not examples of reversible error, but of courtroom demeanor, the control of which is left in the capable hands of the trial judge. Just as review of the record as a whole does not disclose evidence of bias, so too such a review does not disclose improper prosecution behavior rising to the level of reversible prosecutorial error.

The other record citations identified by the defendant fare no better under scrutiny. They include comments during colloquy when issues such as the lack of courtroom decorum were brought to the trial court's attention outside the presence of the jury [RP 667-669.] or when points of law concerning admissibility of evidence were argued [RP 443-53]. It is difficult to imagine how legal argument outside the presence of the jury could possibly be characterized as impugning defense counsel to the jury within the meaning of ***Lindsay.*** In any event the trial court acted appropriately in its rulings on such matters and certainly cannot be said to have abused its discretion.

The defendant also cited the prosecution's rebuttal argument as error. RP 1312-13. "A prosecutor can certainly argue that the evidence does not support the defense theory." ***State v. Lindsay***, 180 Wn.2d at 431. A prosecutor may also argue credibility of witnesses. ***State v. Brett***, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (A prosecutor may draw an inference from the evidence as to why the jury would want to believe a witness.).

The prosecutor rebutted the defense argument concerning Rosendo Robinson. The defense had said of Mr. Robinson:

> Who does the state want to discredit? Who don't they want you to believe? They don't want you to believe Rosendo Robinson. They don't want you to believe the guy who got shot.
>
> Now, interestingly, in their opening -- well, their direct examination of Mr. Robinson, the government goes through the introductory questions. He was raised in Tacoma. He graduated from the schools here, lived here all his life, was in the service, been gainfully employed, and they build him up as a -- an honorable, you know, trustworthy, credible man.
> RP 1280-81

The prosecution's response followed immediately after a limiting instruction. After the limiting instruction the prosecutor argued:

> MR. CURTIS: Thank you, Your Honor.
>
> What the attorneys argue is not evidence. And they say that for a reason because sometimes attorneys may disagree or may have their own perception of the evidence. Let's talk about the statement by Ms. Corey that the state tried to prop up Rosendo Robinson. That's really important. It was three weeks ago, but I came here in my opening, and what did I say about Rosendo Robinson?
> RP 1310.

The prosecution's rebuttal arguments concerning credibility of witnesses were proper but were nevertheless continuously interrupted. In fifteen pages of transcript, the defense attorney objected ten times. Nine of the objections were overruled and one was sustained. RP 1310-25. Many of the objections, like the objection quoted above, were speaking objections in which it could be said that the defense attorney sought to

offer her own running commentary or rebuttal to the argument being presented by the prosecution. An example of this was, "Your Honor, I'm going to object. Argument is argument. It is not agreement. It is argument. It is to assist the jury with the facts. It is not evidence. Counsel knows that." RP 1313. The prosecution did not trade "verbal jabs and snide remarks throughout over 90 volumes" as did the attorneys in ***Lindsay***. Instead, the prosecutor patiently persevered with his argument despite continuous interruption. In this, the prosecution's conduct was above reproach and the trial court's reaction was eminently reasonable.

One particular claim by the defense bears specific mention. The defendant states categorically that the prosecutor used a foul epithet when speaking to the defendant's father. Opening Brief, p. 74. The prosecutor denied the accusation. The defense argument is contradicted by the trial court's ruling and implicit finding to the contrary. At the prosecution's request the next day, trial court held a short colloquy in which he heard from a deputy sheriff, the prosecutor, the defense attorney, and the defendant's father. RP 659-663, 667-70. The trial court then issued a verbal admonition to the father:

> THE COURT: Well, there won't be a problem. I know. I guarantee there will not be a problem because, Mr. Jefferson, I told you before, if you disrupt this proceeding, you're out of here. Period. The end. Okay? RP 670.

When the trial court's admonition was immediately spurned, the court took action and ejected the father:

> SR. MR. JEFFERSON: (Inaudible) he disrespect my son, he disrespect my son, he disrespect my son (inaudible) to you and him respecting son.
> THE COURT: Yeah. Okay. I'm going to hold him in contempt. You gotta go.
> *Id.*

Had there been any fault on the part of the prosecutor the court's action would have been directed at the prosecutor. It was not. It was directed at the offending party, the defendant's father. Furthermore, at the end of the colloquy the defense attorney acknowledged that the defendant's emotions had gotten the better of him. RP 672-73. But even then her protestations were unsupported by the trial court's findings concerning the defendant's affect and demeanor: "And let me make a record. I'm looking at Mr. Jefferson's affect, and I don't think he's that upset." RP 673.

In sum, the prosecution and the trial court were in a somewhat heated trial. They dealt with circumstances not of the prosecutor's making in which a supporter or supporters of the defendant disrupted the proceedings and not for the first or last time. Both the prosecution and the trial court dealt with these most difficult of trial circumstances in a measured and reasonable manner. This incident, like the others cited in this moderately contentious trial, is not evidence of prosecutorial error or misconduct.

6. THE DEFENDANT HAS NOT SUSTAINED HIS BURDEN OF ESTABLISHING INEFFECTIVE ASSISTANCE WHERE IT HAS NOT BEEN SHOWN THAT TRIAL COUNSEL'S APPROACH LACKED ANY CONCEIVABLE LEGITIMATE STRATEGY.

To prevail on an ineffective assistance of counsel claim a defendant must prove his counsel's performance was deficient and that the deficiency prejudiced the defense. ***State v. Garret***, 124 Wn.2d 504, 518, 881 P.2d 185 (1994), citing ***Strickland v. Washington***, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

A trial attorney's counsel can be said to be deficient when, considering the entirety of the record, the representation fell below an objective standard of reasonableness. ***State v. McFarland***, 137 Wn.2d 322, 335, 880 P.2d 1251 (1995). "***Strickland*** begins with a strong presumption that counsel's performance was reasonable." ***State v. Grier***, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011), quoting ***State v. Kyllo***, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). "To rebut this presumption, the defendant bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel's performance." *Id.* at 42, quoting ***State v. Richenbach***, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). ***State v. Piche***, 71 Wn.2d 583, 590, 430 P.2d 522 (1967), *cert denied*, 390 U.S. 912, 88 S. Ct. 838, 19 L. Ed. 2d 882 (1968).

When evaluating an ineffective assistance argument, exceptional deference must be given to counsel's tactical and strategic decisions. ***In re Elmore***, 162 Wn.2d 236, 257, 172 P.3d 335 (2007), citing ***Strickland***, 466 U.S. at 689. ***State v. Hendrickson***, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), *overruled on other grounds* by ***Carey v. Musladin***, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Strickland***, 466 U.S. at 689. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Id.* The defendant bears the burden of establishing the absence of any "conceivable" legitimate strategy or tactic explaining counsel's performance to rebut the strong presumption that counsel's performance was effective. ***State v. Grier***, 171 Wn.2d at 42.

The decision of when, whether and how to object, and what to argue are classic examples of tactical decisions. ***State v. Madison***, 53 Wn. App. 754, 763, 770 P.2d 662 (1989), citing ***Strickland***, 466 U.S. at 763. Only in egregious circumstances will the failure to object constitute ineffective representation. *Id.* Ineffective assistance claims based on

objections require the defendant to prove: (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that the objection would have likely been sustained; and (3) that the result of the trial would have been different if the objection was successful. ***State v. Saunders***, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

In this case two instances of the defense attorney's conduct during the trial were of particular concern. The first was the incident involving Harmony Wortham's attempt to flee to California in the middle of her testimony. *See* RP 512, *et. seq.* In that incident, even if one were to assume that the defense attorney acted unethically or improperly or even criminally, there is no evidence of prejudice. There is no evidence that the jury was aware of what happened. So far as they knew, there was a minor delay in Ms. Wortham's testimony, but thereafter the defense attorney thoroughly and effectively cross examined her once she was called back to the stand. RP 616. It may be a matter of debate whether the defense attorney's conduct was improper but it cannot be said that there was any impact on the trial.

The second incident concerned defense witnesses. The trial court briefly expressed concern about whether the witnesses had prepared or should have prepared reports that should have been shared with the prosecution. RP 1009, 1044-46, 1115-16. The court's ruling however

permitted the primary defense expert, Kay Sweeney, to testify over the prosecution's objection. RP 1117-19. Furthermore, the court only restricted the other witness, Patrick Pitt, from testifying when it became clear that he lacked personal knowledge, expertise, and was proposing to introduce duplicates of images already admitted into evidence. RP 1053-56. Even so the court allowed the defense the opportunity to recall witnesses to authenticate the images at issue when it said, "Well, I'm denying it today, but there's nothing that precluded the defense from showing the freeze frames to Ms. Wortham, Ms. Whoever", to which the defense attorney said, "I guess I'll recall them." RP 1056. It undermines the defense argument about ineffective assistance when no further mention of the Patrick Pitt images re-surfaced throughout the rest of the trial.

In his argument about ineffective assistance the defendant identifies numerous instances of alleged inappropriate defense attorney behavior. Any criminal practitioner is aware that the grey area is wide indeed between zealous advocacy and improper conduct toward the tribunal. *See* RPC 3.1 ("A lawyer for the defendant in a criminal proceeding . . . may nevertheless so defend the proceeding as to require that every element of the case be established."). Where one defense attorney might utilize cooperation and agreement, another might use

antagonism and non-agreement. It would be impossible to judge which approach would have been more effective in any given case.

In this case the defense attorney's zeal in the face of the video evidence of the defendant's guilt could be deemed admirable. With one exception the defense attorney's performance appeared to be satisfactory to the defendant based on the scarcity of *pro se* objections. During the Harmony Wortham affair, the defendant did make a *pro se* motion for a new attorney. RP 590. The thrust of his pitch however was actually dissatisfaction with the prosecutor:

> I put a motion against Mr. Curtis. He was there with an incident during Mr. Lester's court date where he tried to get me arrested. You were in court, she was in the court, and he was in the court (indicating.) This is a vengeful attack to that -- to that incident that happened. I don't think he should be allowed to try my case, due to these -- this issue, this personal vendetta that he has against me. I don't think you should be judging this, being it was in your courtroom that this happened. I should get an unbiased prosecutor, an unbiased judge and secretary that has no involvement, that never knew me, that never had an altercation or incident with me.
> RP 590-91.

Throughout the rest of the trial the defense attorney continued her zealous advocacy with what could arguably be viewed as the tacit approval of the defendant. There is no reason now to second guess her approach in this highly charged case involving extremely serious crimes.

7. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY NOT DECLARING A MISTRIAL FOR JURY MISCONDUCT WHERE THE COMPLAINED ABOUT JUROR WAS EXCUSED AND ALL THE OTHER JURORS AFFIRMED THAT THEY HAD NOT BEEN AFFECTED BY THE ALLEGED MISCONDUCT.

The defendant assigns error to the trial court's decision to remove and replace a juror rather than declare a mistrial. RP 1266-67. Where trial irregularities concerning the jury are concerned, a new trial is warranted only when the defendant "has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly." ***State v. Bourgeois***, 133 Wn. 2d 389, 406, 945 P.2d 1120 (1997), quoting ***State v. Russell,*** 125 Wn.2d 24, 85, 882 P.2d 747 (1994). ***State v. Lemieux,*** 75 Wn.2d 89, 91, 448 P.2d 943 (1968) ("Something more than a possibility of prejudice must be shown to warrant a new trial."). The decision is a matter left to the discretion of the trial court. ***State v. Bartholomew,*** 98 Wn.2d 173, 211, 654 P.2d 1170 (1982) (The granting or denial of a new trial is a matter primarily within the discretion of the trial court, and the decision will not be disturbed unless there is a "clear abuse of discretion."), quoting ***State v. Wilson,*** 71 Wn.2d 895, 899, 431 P.2d 221 (1967).

Under the deferential abuse of discretion standard, an appellate court "does not substitute its judgment for that of the [trial] court" but rather "will reverse only if we have 'a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'." ***United States v. Schlette***, 842 F.2d 1574, 1577 (9th Cir.1988), citing ***Barona Group of the Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc.,*** 824 F.2d 710, 724 (9th Cir.1987), and ***United States v. Kramer***, 827 F.2d 1174, 1179 (8th Cir.1987). An abuse of discretion occurs "only if no reasonable person would adopt the view espoused by the trial court." ***State v. Demery,*** 144 Wn.2d 753, 758, 30 P.3d 1278, 1281 (2001), citing ***State v. Sutherland,*** 3 Wn. App. 20, 21, 472 P.2d 584 (1970). "Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion." *Id.* "The trial court's ruling, therefore, will not be disturbed unless this court believes that no reasonable judge would have made the same ruling." ***State v. Thomas,*** 150 Wn.2d 821, 854, 83 P.3d 970, 986 (2004), citing ***State v. Woods***, 143 Wn.2d 561, 595–96, 23 P.3d 1046 (2001).

It would be a misnomer to characterize Juror 8's actions as misconduct. She noticed a person who had been in the courtroom who

appeared to be making note of the personal transportation of the jury just before deliberations. RP 1191-98. She brought it to the attention of the judicial assistant the next day at the behest of the rest of the jury. RP 1189. What more could any court hope of a diligent and careful juror? To say that the actions of a courtroom spectator or spectators constitute misconduct of the jury is inaccurate.

However, regardless of whether the juror or the spectators were at fault, the trial court considered the effect of the events on Juror 8's fitness to continue serving and replaced her. This too is what one would hope of a careful and experienced trial judge whose overriding concern was fairness of the trial proceedings.

RCW 2.36.110 requires the removal of an unfit juror. Reasons for such removal may include "bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service." *Id.* In this case bias or prejudice are the possible bases that could apply to Juror No. 8. After Juror No. 8 described her experience as "unnerving" [RP 1193-94.] the trial court erred on the side of caution and replaced her with an alternate. This was done with the defendant's express consent. RP 1211. Furthermore, the court conducted a brief *voir dire* of the rest of the jury,

again with the defendant's consent, to ensure that no other juror was affected. *Id.*

The reactions of the rest of the jury varied. Some such as Juror No. 3 were unaware of what had happened. RP 1217. Others, such as Juror No. 2, were aware but unaffected. RP 1214. They all expressly stated that their ability to remain impartial was intact and unaffected by Juror 8's observations or concerns. RP 1215, 1217, 1218, 1220, 1225, 1227, 1231, 1233, 1235, 1237. Under these circumstances, the cautious handling of the incident, the conservative decision to replace the affected juror, and the time taken to delve into the matter are a textbook example of how such an incident should be handled.

There is little or no basis to conclude that "no reasonable judge would have made the same ruling." ***State v. Thomas,*** 150 Wn.2d at 854. Moreover, in light of the responses from all the jurors that the incident did not affect them, there is no basis to conclude that a mistrial should have been declared.

8. THE DEFENDANT HAS NOT MET HIS BURDEN OF PROOF AS TO CUMULATIVE ERROR WHERE THERE WAS NO ERROR IN THE INTRODUCTION OF EVIDENCE, DEFENSE COUNSEL'S PERFORMANCE, OR ARGUMENT.

Under the cumulative error doctrine, a defendant may be entitled to relief if a trial court were to commit multiple, separate harmless errors.

State v. Venegas, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). In such cases, each individual error might be deemed harmless, whereas the combined effect could be said to infringe on the right to a fair trial. *Id.* citing ***State v. Weber***, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), and ***State v. Hodges***, 118 Wn. App. 668, 673–74, 77 P.3d 375 (2003). "The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial." *Id.*

The first requirement for cumulative error is multiple, separate errors. The defense has not sustained its burden as to this requirement. The defendant cited some eleven separate places in the transcript where error is alleged because a mistrial was not granted. The first of these was addressed above concerning the first witness, on the first full day of testimony, that is the testimony of Officer Brent Roberts. It continues to be the case that the objection was not a speaking objection, the response was possibly a "speaking response" and that in any case there was no basis for a mistrial.

The second citation fares no better under scrutiny. In that argument the defense alleges that a mistrial should have been granted under the following circumstances:

> Q Okay. At some point in that interview, he provided you with a -- what is called --
> MS. COREY: I'm going to object to this. I think

we had deferred this until later this afternoon.
RP 476.

After this rather innocuous question and objection, the court conferred with the attorneys briefly at sidebar, then excused the jury. *Id.* As was not to be an unusual circumstance, the defense attorney morphed her objection into a mistrial motion. RP 479. The trial court heard argument and then ruled as follows:

> THE COURT: Excuse me. That's not the picture. I just looked at the picture.
>
> Two things: 1. It is relevant.
>
> 2. I looked at the photos before I admitted them.
>
> I believe that the probative value far outweighs any potential prejudice. Everything is prejudicial. The question is whether it's really relevant and probative and, the probative value does outweigh the -- any potential prejudice.
>
> The witness indicated it's a fair and accurate representation of the scene that evening. I don't believe it's cumulative. All four of the photos had different people in them, and I believe it's properly admitted, and I'm going to deny the motion for mistrial.
> RP 479-81.

The foregoing question, objection, mistrial motion and ruling is no more evidence of cumulative error than the objection during the Brent Roberts testimony. Some might argue that it was ill-advised defense tactics but the opposite could be argued as well. In short it provides no support for a cumulative error argument.

Review of the remaining record citations indicates, with a couple of exceptions, that further argument is unnecessary and would be cumulative considering the State's substantive arguments above. Two possible exceptions can be dealt with summarily. First, there is an allegation of error at the conclusion of testimony by defense witness Kay Sweeney. RP 1133. There the trial court referenced that it had *granted* the defense request that Mr. Sweeney create a hand drawn illustrative exhibit. Curiously, the court's ruling in favor of the defendant is now alleged to have been error, although no argument or citation of authority is offered in support of that contention. *See* Opening Brief, p. 104-05. Second, during preliminary matters the parties discussed pre-trial motions and what was agreed to and what was disputed. Whatever may be error in this part of the record is elusive. In any case, neither of these allegations of harmless error satisfy the defendant's burden on a cumulative error claim.

D. CONCLUSION.

For the foregoing reasons, the Court should affirm the defendant's conviction and sentence.

DATED: July 19, 2016.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S.~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7.19.16 Theresa Kay
Date Signature

PIERCE COUNTY PROSECUTOR

July 19, 2016 - 2:48 PM

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